Prescription of debt. Inability of creditor company to proceed owing to failure to keep itself in good standing in the jurisdiction of its incorporation is not *empêchement d'agir,* sufficient to suspend the running of time.

[2024]GRC044

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Civil Matter 1878

Before: **HER HONOUR HAZEL ELEANOR MARSHALL KC**
LIEUTENANT BAILIFF
(Sitting alone)

IN THE MATTER OF THE L TRUST

BETWEEN:

(1) A LIMITED
(2) B LIMITED
(3) C LIMITED
(4) AT LIMITED **Plaintiffs**

-v-

X LIMITED **Defendants**

DIR **Notified party**

Date of hearing: 23rd May 2024
Judgment given: 23rd May 2024

Advocate for AT Limited: Advocate N. Kapp
Advocate for First to Third Plaintiffs: Advocate L. M. Thibeault
Advocate for DIR: Advocate R. D. Breckon

Legislation, cases and texts referred to:

Cases

Guernsey:

Gilliham v NRG Benelux BV, 2003-04 GLR Note 7

England and Wales:

Financial Services Compensation Scheme v Larnell [2006] QB 808

Texts

Oeuvres de Pothier Dupin, (Paris 1824) Vol 8, Part 1 Ch 1 Art III,

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J U D G M E N T

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1. This is an anonymised version of a judgment delivered ex tempore and in camera on 23rd May 2024, which has been approved for publication, as it deals with a point of law on which there is no Guernsey authority. The background recital is necessary for an understanding of the point and the judgment; the remainder of the judgment contains the official approved version of the ex tempore judgment as delivered.

General Background

2. The application before the court is for the determination of a preliminary issue arising in the above proceedings, which concern the affairs of a large and complex family trust, the L Trust, and which have accordingly been conducted in camera. As to this, the first two Plaintiffs are the former trustees of the L Trust. The fourth Plaintiff, AT Limited is the present Trustee, having replaced the former trustees in 2023. A simple account of the background is that the trust in question concerns one branch of the L family, comprising the mother (M), two sons (S1 and S2) and daughter (D) and their respective issue. Owing to family tensions, the former trustees proposed to implement a partition of the trust assets between D on the one hand and M, S1 and S2 on the other. However, the proposal to partition itself gave rise to tensions, as there were disputes about the value of, and the appropriate valuation of, certain trust assets. S1 and S2, amongst others, had been involved in managing certain of the businesses owned by the L Trust, whereas D had not been.

3. X Ltd is a company registered in the BVI. Its only member is a company whose shares are owned, though a nominee company, by the trustees of the N Trust, of which trust M, S1 and S2 are among the beneficiaries, but D is not.

4. In June 2006 and again in December 2006, the L Trust, through the former trustees, gave two promissory notes, in considerable sums, to X Ltd. X Ltd had transferred certain assets to the L Trust and the sum recorded by the June Note appears to have been related to the value of such assets. The December note was for two very large but round sums designated in US$ and in €s. The notes were each governed by Guernsey law. They were payable in 10 years' time, namely on 28th June 2016 and 21st December 2016, respectively.

5. In the wider context of the internal family disputes, questions were raised about whether these loan notes were in fact valid and enforceable.

6. On 24th November 2014, these proceedings were commenced by the former trustees. Part of the relief sought was a declaration as to whether or not the loan notes were enforceable. X Ltd appeared on that action and gave its elected address for service in the proceedings as that of its Advocates. It filed defences, consisting almost entirely of non-admissions, on 19th February 2015.

7. On 27th November 2015, directions up to trial were given, with a trial scheduled for March 2016. However, the proceedings were subsequently adjourned whilst negotiations as to the family trust proceedings themselves continued, although nothing was concluded.

8. In 2021, the Royal Court refused to bless the former trustees' decision for partitioning the trust assets. On 19th October 2021 the instant proceedings were adjourned, *sine die*.

9. In the meantime, on 29th June 2018, X Ltd was struck of the Companies Register in the BVI, for being without a resident agent (its former resident agent having resigned without replacement). Under BVI law at that time this would have resulted in X Ltd's being dissolved and ceasing to exist after a further seven years, if nothing were done to restore it to the register. However, this period was subsequently amended in BVI Law, and under transitional provisions, X Ltd became dissolved on 4th July 2023.

10. On 1st December 2023, AT Ltd filed this application for its own addition to the proceedings, and for directions, including the determination of a preliminary issue as to whether, in any event, any liability of the L Trust on the loan notes was now prescribed, more than six years since their maturity dates having elapsed. With the court's directions, that application could be served, of course, on the Advocates acting, or formerly acting, for X Ltd, whose address remained their *élection de domicile* on the record.

11. Various directions were then given as to who should also be notified of the preliminary issue and the application, for potentially having an interest in contesting it, including the known members and former directors of X Ltd at the time when it was struck off, and the Crown in the BVI.

12. DIR, a company registered in the Isle of Man, and the former director of X Ltd wrote to the Advocates for AT Ltd, and whilst explaining that it was without instructions and had no funds to participate in the action, stated that it understood that steps were being taken in the BVI to restore X Ltd to the register, to enable it to take an active part in resisting the preliminary issue, and urged that AT Ltd's application should be adjourned to enable this to happen. AT Ltd declined to consent to this, and the matter was brought before the court.

13. DIR twice applied to the court to adjourn the preliminary issue *sine die* from the scheduled hearing date, so as to enable X Ltd to get itself restored to the BVI Companies Register and (if so advised) to take a full part in resisting the Trust's application. I refused such adjournments prior to the scheduled hearing date on the grounds that there was no actual evidence before the court of such restoration steps actually being taken and, in any event, no evidence of what defence to the claim of prescription X Ltd would be capable of advancing, or proposing to advance, if time were allowed for its formal restoration to the BVI Company Register. At these times, I gave directions to inform any person with an apparent possible economic interest in resisting AT Ltd's assertion of prescription to attend the prospective hearing and to be enabled to be heard and to put any such prospective defence before the court. This was to ensure that whatever directions might be appropriate could be given, to enable the matter to be heard between interested parties (rather than, apparently, simply in default of appearance by X Ltd), always provided that some arguable issue did in fact arise.

14. This included informing M, S1 and S2 of the situation, which DIR did, through their London solicitors. The response, however, was the M, S1 and S2 did not regard themselves as having any part or interest in the matter.

15. At the scheduled hearing date, on 23rd May 2024 therefore, no such interested person did attend to put any case. Advocate Breckon attended the hearing as a courtesy to the court, but without instructions. I express my appreciation of his engagement with the issues in the matter, effectively therefore, as an *amicus curiae.* Having heard argument from Advocate Kapp on behalf of ATL, and examined her assertions critically, I delivered the following judgment.

Introduction

16. First, I should say briefly that I have essentially, today, gone through the people, all the people whom I would regard as having a potential interest in arguing against the argument that Advocate Kapp raises, that these loan notes, whether they were enforceable or not, are now prescribed, and they all appear to me to have been given proper invitation, and ample opportunity, to come to the court and make that point if inclined to do so.

17. I will revert to, and record here, the fact that I refused adjournments earlier when these were requested, largely because the adjournments were requested, it seemed to me, on a basis that did not disclose any real prospect of any actual defence to prescription (an *empêchement* argument being the only apparent defence available) actually being raised, or even being capable of being raised. Nobody has come forward to put forward an arguable case that was going to be argued, and applications to adjourn the matter *sine die* without any such indication were entirely inappropriate in the circumstances.

18. As far as any adjournments were concerned, I looked, as I was invited to, at the various matters in the Gilliham case (*Gilliham v NRG Benelux BV, 2003-04 GLR Note 7)* as to what one should take into account, and I took them into account.

19. I do not regard the argument that 'it has been going on for nine years, basically, what difference does another six months make?' or something like that, as a strong argument in favour of an adjournment. It seems to me that that is the kind of argument that really only has force if somebody is being unduly rushed into something after a long period, as opposed to simply taking what would be a reasonably timely course to deal promptly with whatever application is now being raised to go forward.

20. The Trustee's application is certainly an application that ought to go forward and be decided without unnecessary delay, because it is obviously fundamental to making decisions about the future conduct of the trust. So, on that basis, those adjournments were refused, and again I emphasise that they were refused on the basis that I really did not even get any evidence as to what was going on with a view to any defence being potentially pursued. I was merely told, by way of hearsay report (and in the first instance, even inaccurately) that the X Ltd company had been starting to restore itself to the register, and actual supporting evidence as to what was going on, and what was proposed then to happen, was singularly lacking.

21. I also considered the apparent defences to the claim originally raised in these proceedings for a declaration as to the enforceability (or not) of the debts. These were, as I remarked previously, singularly opaque as to justifying the validity of the notes, with the only matters which were accepted (everything else being "not admitted") being the terms of the loan notes themselves, which were, of course indisputable, and the status of the N Trust, and of M, S1 and S2 as its beneficiaries. Coupling that with the fact that there was nobody who was actually prepared to come and, as it were, make a case or point out what the case would be, as regards supporting the enforceability of the loan notes, it seemed to me that it was right that adjournments should be refused, and this application should therefore proceed, as listed, today.

Are the debts on the notes prescribed?

22. That having been said by way of introduction, now, at the application stage, Advocate Kapp has made out her case that the debts – payments due on two promissory notes governed by Guernsey law – are quite clearly a liability that is subject to a six-year prescription period in Guernsey law, and that the only defence to that assertion would be an *empêchement* defence.

23. When one looks at it, the chronology is that the debts fell due in 2016. However, in 2018, X Limited which was a company registered in the British Virgin Islands was struck of the register in that jurisdiction, following the resignation of its Resident Agent. It is mandatory for a company registered in the BVI to have a local resident agent.

24. I now have before me the legal advice which has been given by BVI lawyers as to the effects of this. This advice is not contested in the circumstances, and it is backed up by reference to BVI statutes. I accept that this advice was given by lawyers in the BVI branch of the same firm (Carey Olsen) as is now acting for the Trustee here in Guernsey, but I do not regard that as being any reason why I should have any doubt about the accuracy of the BVI legal advice.

25. This advice explains exactly the position with regard to companies that have been struck off but are not yet dissolved in the British Virgin Islands, and it was helpful in indicating that the reason for the date on which this company was actually dissolved and ceased to exist was as a result of a new law in the BVI, *[the BVI Business Companies (Amendment) Act 2022, amending the BVI Business Companies Act 2004]* which laid down that when a company was stuck off the register, then rather than wait seven years before it was actually dissolved, the company would be dissolved six months (I think) later. There were transitional provisions which laid down that insofar as any company had been struck off the register earlier than 1st January 2023, then unless it was restored by 1st July 2023, it would become dissolved automatically on 4th July 2023. Thereafter, as I have said, I think the period was reduced to six months rather than the seven years which it had been before, but that is academic, because it is the transitional provisions which apply here.

26. That enactment therefore explains the date on which this company itself was actually dissolved as opposed to merely being struck off, but such dissolution was after the date when the prescription period in respect of these debts had expired in any event, because those dates were in June and December 2022, (ie six years after 2016) respectively.

27. Considering possible arguments about the doctrine of *empêchement d'agir* in this case, Advocate Kapp's first submission is that there was really no *empêchement*, at all; certainly, there was no *empêchement de fait*. This is because it was perfectly obvious, and perfectly discoverable, that the two debts had become due in June and December 2016, as this was quite clear on the face of the relevant documents. Thus, there was nothing that was "undiscoverable" about the company's right of action, or anything more that the company needed to know in order to enforce the notes, but did not.

28. So one then is left only with the question of how the situation as regards X Ltd's status during the prescription period might affect a question of *empêchement de droit.* This is the only matter which could have any effect on the status of the company as to being able to bring an action to enforce these debts. The question is whether the position of a company as a struck off (but not yet dissolved) company in its jurisdiction of registration, would amount to such a disability as to prevent and suspend the running of time against it for the purposes of prescription in Guernsey law. Bearing in mind the fact that there is no active opposition to Advocate Kapp's application, I must be perfectly satisfied that she proves her case that there is no such disability on the basis of the facts which she has put before me. I have therefore examined very carefully the procedures that are involved.

29. The legal advice shows, as Advocate Kapp pointed out, that a company which has been struck off the register in the BVI remains able to continue prosecuting or defending proceedings in which it is already involved at the date of strike off, even whilst it is struck off. It can do so through any "director, member, liquidator or receiver" of it [*See BVI Business Companies Act 2004 s 215].* It can also incur liabilities. However, it (or rather those related persons) cannot commence, or defend, any <u>new</u> proceedings, or otherwise act in relation to the company's affairs, save to apply for restoration to the register.

30. In the present situation, the company was defendant/respondent to proceedings brought on behalf of the former trustees of the Trust for a declaration as to whether (or not) the loan notes were enforceable. It had put in the "opaque" defences which I described above. These present proceedings were commenced in 2014, but from a time in 2015, they had been simply

adjourned, latterly *sine die*, by agreement, but never discontinued. Indeed these proceedings are what has been used as the vehicle for the current Trustee's application for determination of the issue of prescription as a preliminary issue.

31. It therefore seemed to me, that one must examine a little more deeply whether the status of the company during the relevant period (from 2018) whereby it could not commence proceedings whilst struck off but not dissolved, without being restored, could be argued to be amount to some form of *empêchement de droit*.

32. That would depend, and Advocate Breckon (who appeared as a matter of courtesy to the court, having previously represented the Isle of Man entity which had been the corporate director of X Ltd, but who was now without instructions) was quite right to point out, that there could be an argument that, if in fact what prevents prescription running is the commencement of proceedings to vindicate the disputed right, then such a claim is not actually, specifically, an issue in this case itself, as the pleadings currently stand, albeit it could quite easily have been made such a specific issue, at any time. The question, though, might therefore be whether, as a matter of pleading, the possible raising of such a counterclaim by X Ltd was (a) necessary to stop time running and (b) would in those circumstances have been something that it could not do, because that would have amounted to commencing proceedings, rather than just continuing to defend them. A counterclaim is usually regarded as being a fresh claim in its own right, albeit brought in existing proceedings, unless in effect it is simply a defence to the claim that has actually been brought – for example a claimed set off against a claimed debt - in which case it might be simply regarded as being a declaration of the mirror of the claim and therefore as being only a defence.

33. In this instance, as the claim was simply declaratory, it might seem to be arguable that a counterclaim for actual payment raised in the present proceedings might have been regarded as a fresh claim, and therefore one which the company was prevented, from 2018 onwards, from initiating. Advocate Breckon, very properly pursuing his duty to assist the court, is quite right to point out, also, that the legal advice which has been taken does not specifically cover that particular point.

34. My instinctive reaction to this argument would be that effectively making such a (counter)claim in these proceedings would be quite plainly part of all the arguments that were and are actually raised and would be being made in determining the existing claim for declaratory relief as sought, and doing so would fairly be regarded as continuing to defend the existing proceedings and would certainly fall within the sort of area that the BVI law appears to cover as being amongst things that can be done by a director or a member of the company on its behalf, even though the company is currently struck off the register. But I only say that as a matter of impression because, obviously, I have not got evidence of actual BVI law on this subject, and I am not a BVI lawyer. So that is simply an impression.

35. However in any event, even if that argument were right, and it would be the case that the company, once it was struck off in 2018, was effectively prevented from doing the only thing that would stop prescription running – namely actually and formally commencing proceedings by counterclaim actual for payment – then in my judgment, that would still not be an *empêchement d'agir* in the sense required by Guernsey law, because that impediment or disability was something that was well within the company's own control, and was not therefore a "disability" in the relevant sense, at all.

36. Advocate Kapp points out that the company itself had two options for getting itself back into proper standing. It could either itself apply to be restored to the register, pay the necessary penalties, and do whatever else was required to get itself back into good standing so that it did have the full authority and ability to commence a claim to recover the debts, (and I note that the length of time after the later prescription period here presumptively expired, in December

2022, and before the company was actually dissolved on 4th July 2023 exceeded the length of time which the BVI Business Companies Amendment Act 2022 laid down as presumptively sufficient for a company to get itself restored to the register, so that any "suspension" of the prescription period caused by the strike off could and should have been remedied by this means if pursued timeously, and would therefore not have suspended the prescription period materially). Alternatively, if the impediment was that the company did not have the funds to get itself restored, then the alternative would have been to simply accept to be wound up and a liquidator would be appointed who would then be in a position to pursue the debt for the company, in any event.

37. There are certain hints in the evidence which suggest that the company itself did not have funds, there being somewhat vague evidence that seems to suggest it might have had to persuade other persons to finance it. (I am referring to the terms of one letter which says that loans had in fact been made very recently to enable the company to restore itself.) I accept Advocate Breckon's point that I have got no direct evidence that any such funds would have been available earlier, but the circumstances are such that it does seem to me that if this debt were being diligently pursued, then it might reasonably have been thought, and appears likely, that funds could have been obtained to restore the company, if necessary to do so.

38. So Advocate Kapp says that that situation really was not an *empêchement d'agir* at all, in any sense, because there were means by which the company could have acted.

39. It certainly seems to me that that is right, but it seems to me also that, in practice, the real key point is that the reason, and the only reason, why the company is or could be said to be saying that it was "prevented from acting" was the fact that it had allowed itself to be struck off the BVI register through failing to appoint a resident agent, as any operative company in BVI has to do, very similarly to Guernsey, and no doubt failing to pay the necessary fees to keep itself in good standing in the registry.

40. That "prevention" was self-inflicted. I have made this point before, but it seems to me that one cannot rely on an *empêchement d'agir*, as a disability or an *empêchement de droit*, which one has actually created oneself, by allowing oneself to fall into that position. The obvious possibility of abuse of any such principle is quite clear, and in that circumstance it seems to me that as a matter of Guernsey law, such a situation would not be properly viewed as an *empêchement de droit* which would be regarded as legally preventing X Ltd, sufficiently, from being able to pursue these debts if they were pursuable, such that it would actually provide a defence that prescription was suspended and was not running when it eventually ran out in 2022.

41. I have looked at such principle or authority as seems to be available to cast light on this and, as Advocate Kapp, I think, endorses, the principle of *empêchement de droit* seems to apply only to natural persons and relates to a legal *empêchement* that arises because of minority, or lack of capacity (though possibly only without a *curateur*), ie a disability to make legally binding relations, or again because of lack of mental capacity, a lack of ability to take formal legally valid steps to assert or defend one's rights.

42. I was unable to find any decision on "*empechement de droit*" relating to companies, and the only case that Advocate Kapp has managed to find in her research was an English case which dealt with insolvency. That was the case of *Financial Services Compensation Scheme v Larnell* [2006] QB 808 but the discussion there shows that in fact, in my judgment, (and as Advocate Kapp submitted) this is of no help at all as it is in a completely different area of law. Not only did it concern the operation of the English Limitation Act – which, in this instance (and I think rather crucially and importantly) bars the remedy for a cause of action and does not actually extinguish the cause of action itself – and also involve complex facts and arguments about the transfer of rights under insurance policies, but its key finding which might be relevant (namely

that when a company goes into liquidation, its liabilities crystallise at that moment and no further passage of time will enable a limitation argument to be deployed) was based on the operation of the English Insolvency Acts, which dictated this regime, rather than depending on the operation of any principle of limitation itself.

43. So that seems to me to be a completely different situation. I myself looked at the *Oeuvres de Pothier*, (Dupin, Paris 1824, 11 volumes) in case there might be anything which could indicate any helpful analogy (inevitably, being written before 1825, these do not refer to companies as there were none on those days), but the only references I could find were in Volume 8, Part 1 Chapter 1 Article III, which dealt with "*Contre quelles personnes le temps de la préscription peut courir*", at paras 22, 23 – but again, of course, these deal with matters held to prevent natural persons from pursuing their rights and justifying, therefore, the suspension of time in their favour. Apart from minority and incapacity, they included absence abroad in service of the State, or for some other "*juste cause*", without any person being in charge of one's affairs. Whilst plainly of no direct relevance, and regardless of whether such would have been classed as an *empêchement de droit* or an *empêchement de fait*, the whole tenor seems to recognise and underlie the general principle that it is actually the "*justice*" of the impediment's not allowing prescription to run which suspends time, in the origins of Guernsey law. That goes to reinforce my judgment that a self-inflicted impediment therefore would not qualify as *empêchement d'agir*, whether viewed as *empêchement de droit* or *empêchement de fait*, for such purposes.

44. So those are the reasons why I do not think any of the arguments which can possibly be envisaged actually could succeed if they were raised against Advocate Kapp's primary submission, that these debts were due, on any basis, in June and December of 2016 and therefore, by June and December of 2022, they became prescribed. Consequently, her present application, raised when AT Ltd took over and reviewed the position only in December 2023, (that being the point where the proceedings were resuscitated with the request that there be a preliminary issue decided as to whether these debts were any longer due and payable) succeeds. I will therefore make the appropriate declaration or order that she seeks to declare that in fact the Loan Notes are no longer enforceable, whether or not they were ever enforceable in the first place.

Her Hon Hazel Marshall KC
Lt-Bailiff

23rd May, 2024